**Viejas Band of Kumeyaay Indians d/b/a Viejas Casino & Resort *and* United Food and Commercial Workers International Union, Local 135, AFL–CIO.** Case 21–CA–166290

June 21, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On October 11, 2016, Administrative Law Judge Mara-Louise Anzalone issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union each filed answering briefs, and the Respondent filed a reply brief. In addition, the Charging Party Union filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,[1] and to adopt the judge's recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Viejas Band of Kumeyaay Indians d/b/a

---

[1] We affirm the judge's conclusion, for the reasons she states, that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally changing, without giving the Union notice or an opportunity to bargain, its past practice of paying unit and nonunit employees the same annual year-end bonus. We additionally rely on the Board's decision in *Central Maine Morning Sentinel*, 295 NLRB 376 (1989), where the Board similarly found that the employer violated Sec. 8(a)(5) and (1) when, contrary to past practice, it unilaterally excluded unit employees from an across-the-board annual wage increase given to nonunit employees. We do not rely on the judge's citation to *Santa Cruz Skilled Nursing Center, Inc.*, 354 NLRB No. 25 (2009) (not reported in Board volume), a case that was decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

The Respondent makes two arguments in support of its contention that the Union clearly and unmistakably waived bargaining over changes to annual year-end bonuses. First, the Respondent asserts that it gave the Union adequate notice of the planned change in January 2015, when it explained during bargaining that, if certain profit targets were met, it intended to use the year-end bonus to correct the inequity in pay across its employees that would be caused by the Respondent's agreeing to a larger wage increase for unit employees. In the January 2015 statements that the Respondent relies upon, however, the Respondent offered no specifics on how it would use bonuses to correct pay inequity, and, further, the change in bonuses was purely speculative; the Respondent expressly made any potential change contingent on the attainment of undefined profit targets. We find that the Respondent's statements were too indefinite and unspecific to provide the Union with a reasonable opportunity to request bargaining. See, e.g., *Pan American Grain Co.*, 343 NLRB 318, 318, 338 (2004) (general statements about potential workforce reductions made during bargaining months earlier insufficient notice of particular layoffs), enf. denied on other grounds 432 F.3d 69 (1st Cir. 2005).

Second, the Respondent argues that the following zipper clause in art. 29, sec. 3 of the parties' collective-bargaining agreement privileges its making unilateral changes to annual year-end bonuses:

> The Tribe and the Union, for the term of this Agreement, each voluntarily and unqualifiably waive the right to bargain, and each agrees that the other shall not be obligated to bargain collectively, with respect to any subject, matter or practice involving the terms and conditions of employment of the bargaining unit other than as specifically required by an express provision of this agreement.

It is well-established, however, that generally worded zipper clauses such as this one do not amount to clear and unmistakable waiver absent special facts not present here, such as the parties having actively bargained over the zipper clause or discussed the clause's effect on past practices. See, e.g., *Irving Materials*, 364 NLRB No. 97, slip op. at 3 (2016).

We observe that art. 4, sec. 2 of the parties' collective-bargaining agreement states that "all past practices existing prior to the effective date of this Agreement are terminated as of the effective date of this Agreement, unless such past practice is memorialized in a written Tribal policy, ordinance, regulation or other writing." No party cited this provision, much less litigated whether it would operate to terminate the past practice of paying equal annual year-end bonuses to unit and nonunit employees. Absent any arguments by the parties, we decline to consider sua sponte what effect, if any, art. 4, sec. 2 of the agreement might have on this decision. Citing to the principle that the Board may "resolve issues based on a legal standard not expressly raised by the parties," our dissenting colleague would consider this provision of the collective-bargaining agreement and find it controlling. We respectfully disagree, however, with his suggestion that this is a matter of determining what legal analysis is applicable. Further, we note that, because no party litigated this issue, the record is insufficient to adequately interpret how art. 4, sec. 2 of the parties' agreement would apply here, if at all. See generally *Ohio Power Co.*, 317 NLRB 135, 136 (1995) (examining all the circumstances to conclude that contractual language stating, "The parties agree . . . that any prior written or oral agreements or practices are superseded by the terms of this Agreement" and that "no such written or oral understandings or practices will be recognized in the future unless committed to writing and signed by the parties" did *not* authorize employer to discontinue practice of allowing union workers' compensation officers to take unpaid time off to attend workers' compensation hearings.). For example, we cannot be certain that the past practice has not been "memorialized in a written Tribal policy, ordinance, regulation or other writing" within the meaning of the exception in art. 4, sec. 2.

Having found that the Respondent's failure to pay unit employees the same year-end bonus as nonunit employees violated Sec. 8(a)(5) and (1) and thereby warrants a remedy including rescission and backpay, we find it unnecessary to pass on the Union's exceptions to the judge's dismissal of the allegation that the Respondent's conduct also violated Sec. 8(a)(3), because adding an 8(a)(3) finding would not materially affect the remedy.

[2] In adopting the judge's recommended remedy, we do not rely on her erroneous description of the Respondent's change to its bonus past practice as "discriminatory." We shall modify the judge's recommended Order and substitute a new notice to conform to the violation found and the Board's standard remedial language.

Viejas Casino & Resort, Alpine, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally departing from its established practice of paying unit and nonunit employees the same annual year-end bonus, without first affording the Union notice and an opportunity to bargain.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes to unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> Individuals employed within the following classifications: Asian Cook, Asian Host/Cashier, Barback, Barista, Bartender I, Bartender II, Bartender III, Bingo Snack Bar Attendant, Busser, Busser-Buffet, Busser-Restaurant, Casino Porter, Casino Service Attendant, Cook I, Cook I-Pastry, Cook II, Cook II-Fine Dining, Cook II-Pastry, Cook III, Cook III-Fine Dining, Expediter, F&B Attendant, Host-Fine Dining, Host/Cashier II, Host/Cashier Non-Tipped, Host/Cashiers Tipped, Kitchen Utility I, Kitchen Utility/Heavy Cleaner, Maint Utly Wrkr, Server Bingo, Server Buffet, Server Entertainment, Server Fine Dining, Server Restaurant, Server Table Games Cardrm, and Spec Functions Personnel.

(b) Rescind the reduction to unit employees' annual year-end bonus unilaterally implemented in December 2015.

(c) Make unit employees whole for any loss of earnings suffered as a result of the unlawful reduction to the annual year-end bonus in the manner set forth in the remedy section of the judge's decision.

(d) Compensate unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(e) Within 14 days after service by the Region, post at its Alpine, California facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 21, 2018

_____

Lauren McFerran, Member

_____

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting.

In this case, the General Counsel alleges, and the majority finds, that the Respondent unilaterally changed an established past practice of giving both unit and nonunit employees the same year-end bonuses without providing the Union notice and an opportunity to bargain. The Respondent defends against this allegation by arguing that it adhered to its established past practice of providing the same overall compensation to unit and nonunit employees, so unit employees received a smaller year-end bonus to offset a negotiated increase in their hourly wages. Both of these positions, however, are foreclosed by the plain and unambiguous language of article 4 section 2 of the parties' collective-bargaining agreement,

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

effective March 11, 2015, stating that "all past practices existing prior to the effective date of this Agreement are terminated as of the effective date of this Agreement, unless such past practice is memorialized in a written Tribal policy, ordinance, regulation or other writing." This contract article, in my view, is dispositive of the General Counsel's argument, the Respondent's defense, and the majority's rationale for finding the violation.[1]

Consequently, I would find that the Respondent violated Section 8(a)(5) of the Act by unilaterally granting unit employees a $500 bonus without providing the Union notice and an opportunity to bargain because the bonus was not a part of their collective-bargaining agreement. The proper remedy for this violation is to rescind, upon the Union's request, the 2015 year-end bonuses paid to unit employees and to order the Respondent to bargain with the Union before implementing any changes to unit employees' wages, hours, or other terms and conditions of employment. In my view, the majority's decision to award unit employees a make-whole remedy, based on a past practice that has been terminated, affords those employees with an unwarranted $500 windfall. I therefore respectfully dissent.

Dated, Washington, D.C. June 21, 2018

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[1] The majority correctly notes that no party cited art. 4 sec. 2 or argued that it terminated the parties' past practice regarding year-end bonuses. However, the Board has held that it has the authority to resolve issues based on a legal standard not expressly raised by the parties. *The Boeing Co.,* 365 NLRB No. 154, slip op. at 21 (2017); see also *Kamen v. Kemper Financial Services,* 500 U.S. 90, 99 (1991) ("[T]he court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."). The majority also asserts that, because it was not litigated, the record is insufficient to interpret art. 4, sec. 2 and, therefore, the Board should ignore it. I disagree. First, I believe in this case the Board should hold the parties to the clear and unambiguous bargain they agreed to as part of the collective-bargaining process and which is in the record before us. Second, because art. 4, sec. 2 is clear and unambiguous, no interpretation is necessary and no additional evidence would even be admissible regarding its application here. See *Quality Building Contractors,* 342 NLRB 429. 430-131 (2004) (construing a collective-bargaining agreement based on the "four corners" of the document and recognizing that parol evidence is inadmissible to vary its unambiguous terms); see also *NLRB v. Electrical Workers, Local 11,* 772 F.2d 571, 575 (9th Cir. 1985) ("We agree with the NLRB that the language in the collective bargaining agreement is unambiguous. Where contractual provisions are unambiguous, the NLRB need not consider extrinsic evidence. Parol evidence is therefore not only unnecessary but irrelevant.").

The majority states that they cannot be certain that the past practice regarding year-end bonuses has not been "memorialized in a written Tribal policy, ordinance, regulation or other writing" within the meaning of the exception in art. 4, sec. 2. However, under the record, there is no basis to speculate that the Respondent may have memorialized any past practice of awarding bonuses. As the judge found, the topic of bonuses came up twice in the parties' negotiations and the Respondent expressed no intention of awarding the unit employees a year-end bonus. If the Respondent had no intention of awarding unit employees a year-end bonus, it would not have memorialized such a requirement in writing. Moreover, irrespective of art. 4, sec. 2, any written evidence of the Respondent's obligation to award year-end bonuses would have been relevant to deciding the scope of the parties' purported past practice, and therefore would have been especially probative to deciding this case. Thus, any written memorialization would have been part of the record if it existed.

In addition, in support of their position, the majority cites *Ohio Power Co.*, 317 NLRB 135, 136 (1995), a case finding that a generally-worded management-rights clause and a zipper clause did not create a "clear and unmistakable" waiver of the union's statutory right to bargain over the termination of a past practice. In that case, the parties' zipper clause stated that "any prior written or oral agreements or practices are superseded by the terms of this [a]greement. The parties further agree that no such written or oral understandings or practices will be recognized in the future unless committed to writing and signed by the parties." 317 NLRB at 135. The agreement in *Ohio Power Co.* contained no terms pertaining to the past practice at issue and so there was nothing in the agreement to change, or supersede, that practice. Id. at 136. The Board found that the union had not waived its right to bargain over the past practice because the agreement did not address it. Id. Thus, the employer in that case violated Sec. 8(a)(5) and (1) by unilaterally ending it without a "clear and unmistakable" waiver of the union's statutory right to bargain over the practice. Id. at 135. Moreover, the Board in its reasoning for finding the violation in *Ohio Power Co.* did not mention the portion of the zipper clause stating that no "understandings or practices will be recognized in the future," presumably because the past practice at issue had existed prior to the execution of the agreement and therefore was not one that would have been recognized "in the future." At the very least, the language of the zipper clause in *Ohio Power Co.* was ambiguous. Here, on the other hand, the parties' agreement explicitly provides that "all past practices existing prior to the effective date of this Agreement are terminated." Accordingly, under art. 4, sec. 2, although the Union did not waive its statutory right to bargain over changes to employee bonuses, the parties clearly and unambiguously terminated any preexisting past practice regarding employee bonuses.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally depart from our established practice of paying unit and nonunit employees the same annual year-end bonus, without first affording the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes to unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

Individuals employed within the following classifications: Asian Cook, Asian Host/Cashier, Barback, Barista, Bartender I, Bartender II, Bartender III, Bingo Snack Bar Attendant, Busser, Busser-Buffet, Busser-Restaurant, Casino Porter, Casino Service Attendant, Cook I, 10 Cook I-Pastry, Cook II, Cook II-Fine Dining, Cook II-Pastry, Cook III, Cook III-Fine Dining, Expediter, F&B Attendant, Host-Fine Dining, Host/Cashier II, Host/Cashier Non-Tipped, Host/Cashiers Tipped, Kitchen Utility I, Kitchen Utility/Heavy Cleaner, Maint Utly Wrkr, Server Bingo, Server Buffet, Server Entertainment, Server Fine 15 Dining, Server Restaurant, Server Table Games Cardrm, and Spec Functions Personnel.

WE WILL rescind the reduction to unit employees' annual year-end bonus unilaterally implemented in December 2015.

WE WILL make unit employees whole, with interest, for any loss of earnings suffered as a result of the unlawful reduction to their annual year-end bonus.

WE WILL compensate unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

VIEJAS BAND OF KUMEYAAY INDIANS
D/B/A VIEJAS CASINO & RESORT

The Board's decision can be found at www.nlrb.gov/case/21-CA-166290 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

*Lisa E. McNeill, Esq.,* for the General Counsel.
*George S. Howard, Esq. (Jones Day),* for the Respondent.
*Michael D. Four* and *Daniel E. Curry, Esqs. (Schwartz, Steinsapir, Dohrmann & Sommers LLP),* for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case on June 13–14, 2016, in San Diego, California. Based on charges and amended charges filed by the United Food and Commercial Workers International Union, Local 135, AFL–CIO (Local 135, the Union or Charging Party), the Regional Director for Region 21 issued a complaint on April 26, 2016 (the complaint). The General Counsel alleges that Respondent Viejas Band of Kumeyaay Indians d/b/a Viejas Casino & Resort (Viejas, the Tribe or Respondent) violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act), by paying an annual bonus to its represented work force of one-half the amount it paid its nonrepresented employees. Respondent, a federally recognized Indian tribe, argues that it is not subject to the Act and, alternately, that it did not commit the unfair labor practices alleged.

At trial, all parties were afforded the right to call, examine and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs.[1] Posthearing briefs were filed timely by the parties and have been carefully considered.[2]

### JURISDICTION

Respondent operates the Viejas Casino & Resort (the casino operation or Respondent's operation) on its reservation located approximately 35 miles from San Diego, California. The Tribe has approximately 359 members, of whom 266 are adults. As the parties have stipulated, there is no treaty between Respondent and the United States. The Tribe is governed by a General

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "U Exh." for Local 135's Exhibit; and "Jt. Exh." for Joint Exhibit.

[2] On July 20, 2016, Respondent filed an unopposed motion to correct the record, which is hereby granted. The record is therefore amended to reflect the proposed changes set forth in that motion.

Council consisting of the voting Tribal membership, as well as a seven-member, elected Tribal Council. Although the casino's general manager reports directly to the Tribal Council, there is no evidence of the council taking a role in establishing terms and conditions of employees in the Casino operation. That said, the Tribe has adopted a Tribal Labor Relations Ordinance, which purports to regulate labor relations for individuals employed by the casino operation. (Jt. Exh. 1; R. Exh. 1; Tr. 392, 399, 421–422, 430–431.)

The casino operation, which is located entirely within the boundaries of Tribe's reservation, offers various forms of gaming, live entertainment and dining, all of which are operated by the Tribe. Respondent's operation also includes a 237-room hotel, featuring meeting spaces and ball rooms. In addition, the Tribe owns and operates an outlet shopping center. During the year ending March 31, 2016 (relevant time period), Respondent's casino operation had gross revenues in excess of $500,000, and Respondent, in its operation, purchased goods and services in excess of $50,000 directly from points outside the State of California. During the relevant time period, Respondent employed approximately: 118 employees at the hotel (3 of whom were Tribal members); 273 individuals at the shopping center (8 of whom were Tribal members) and 1100 employees at the casino itself (11 of whom were Tribal members).

Respondent's operation is open to the general public, and Respondent advertises it via traditional and online media venues, including its Internet site. A comparison of the number of Tribal members to the casino operation's average number of daily customers establishes that the vast majority (at least 90 percent) of Respondent's patrons are non-Tribal members. Revenue from the casino operation is responsible for the vast majority (more than 99 percent) of the Tribe's funding and is critical to maintaining its internal governmental operations, including the provision of education, fire services, security, public works, healthcare and housing for Tribal members. (Jt. Exh. 1; R. Exh. 18; Tr. 305, 392, 400.)

From approximately 1999 until 2014, a unit of mainly food and beverage employees working in the casino operation was represented by the Communications Workers of America (CWA). That year, a petition to decertify was filed, and Local 135 intervened in the subsequent election proceeding. (Tr. 52) On August 27, 2014, Respondent and Local 135 signed a Stipulated Election Agreement (Stipulation) approved by Region 21 of the Board. By that Stipulation, the Tribe agreed that the representation proceeding would be "governed by the Board's Rules and Regulations," and further agreed that it was "engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act." (GC Exh. 1(j).) On September 30, 2014, Local 135 was certified by the Board as the exclusive bargaining representative of approximately 490 food and beverage employees working at the Casino (the unit).[3]

In evaluating whether Respondent's casino operation is subject to the Act, I am bound by the Board's holding in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007). In that case, the Board set forth its standard for determining when it would assert jurisdiction over businesses owned and operated by Indian tribes on Tribal lands. The Board found that the Act is a statute of "general application" that applies to Indian tribes, citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Accordingly, the Board found it proper to assert jurisdiction, unless (1) it is shown that the Act "touche[d] exclusive rights of self-government in purely intramural matters"; (2) application of the Act would abrogate treaty rights; or (3) there was "proof" in the statutory language or legislative history that Congress did not intend the Act to apply to Indian tribes. 341 NLRB at 1059, citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985). The Board also held that it would make a further inquiry to determine whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction. Id. at 1062.

Applying the principles recognized in *San Manuel*, the Board has repeatedly asserted jurisdiction over Tribal-owned and operated casinos. See, e.g., *Casino Pauma*, 362 NLRB No. 52, slip op. (2015); *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB No. 45 (2014), enfd. 788 F.3d 537 (6th Cir. 2015), cert. denied 136 S. Ct. 2508 (2016); *Soaring Eagle Casino & Resort*, 361 NLRB No. 73 (2014), enfd., 791 F.3d 648 (6th Cir. 2015), cert denied, 136 S. Ct. 2509 (2016). I can find no factual basis for reaching a different conclusion here. With respect to statutory jurisdiction, none of the *San Manuel* exceptions applies in this case. First, under Board law, the application of the Act to Respondent's operation would not implicate the Tribe's right to self-governance because the casino operation is a commercial enterprise in interstate commerce that plays no direct role in "intramural matters" such as tribal membership, inheritance rules and domestic relations. *San Manuel*, supra at 1063 (citations omitted). It is noteworthy in this regard that the vast majority of both customers and employees of the Casino operation are not members of the Tribe.[4] Second, there is no treaty between the Tribe and the United States, making the second exception inapplicable. Finally, as the Board noted in the *San Manuel* case itself, there is no evidence in the language or legislative history of the Act to suggest that Congress intended to exclude Native Americans or their commercial enterprises from the Act's jurisdiction. Id. at

[3] The unit currently consists of individuals employed within the following classifications: Asian Cook, Asian Host/Cashier, Barback, Barista, Bartender I, Bartender II, Bartender III, Bingo Snack Bar Attendant, Busser, Busser-Buffet, Busser-Restaurant, Casino Porter, Casino Service Attendant, Cook I, Cook I-Pastry, Cook II, Cook II-Fine Dining, Cook II-Pastry, Cook III, Cook III-Fine Dining, Expediter, F&B Attendant, Host-Fine Dining, Host/Cashier II, Host/Cashier Non-Tipped, Host/Cashiers Tipped, Kitchen Utility I, Kitchen Utility/Heavy Cleaner, Maint Utly Wrkr, Server Bingo, Server Buffet, Server Entertainment, Server Fine Dining, Server Restaurant, Server Table Games Cardrm, and Spec Functions Personnel.

[4] The Tribe argues that its ability to operate its intramural affairs is nearly wholly dependent on revenues from the casino operation and therefore application of the Act to the casino operation would effectively regulate such affairs. This argument, however, has been explicitly rejected by the Board. See *San Manuel*, supra at 1063; see also *Little River Band*, supra at fn. 5.

1058–1059.[5]

Respondent urges that the Board should decline to exercise its jurisdiction over the Tribe based on the fact that it has adopted a Tribal Labor Relations Ordinance which grants its employees rights similar to those granted by Section 7 of the Act. Under the circumstances, Respondent argues, there is no necessity to "effectuate the policies of the Act." (R. Br. at 23–24.) This argument misapprehends the Board's standard for exercising its discretionary jurisdiction. As the Board made clear in *San Manuel*, the discretionary jurisdiction analysis requires balancing the Board's mandate to "protect and foster interstate commerce" against potential harm to tribes' special attributes of sovereignty, not a consideration of whether a particular Tribal employer had agreed to grant its employees rights that echo the protections of federal law. See *San Manuel*, supra at 1062–1063.

Consistent with the foregoing, I find that the Act applies to the instant dispute affecting commerce, and that the Board has jurisdiction over this dispute, pursuant to Section 10(a) of the Act.[6] I further find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that, based on the record as a whole and specifically on the undisputed testimony of former Local 135 Organizing Director German Ramirez (Ramirez), that the Union constitutes a "labor organization" within the meaning of Section 2(5) of the Act.[7]

## ALLEGED UNFAIR LABOR PRACTICES

It is undisputed that, on or about December 11, 2015, Respondent paid each of the unit employees a $500 bonus. (Jt. Exh. 1.) The General Counsel alleges that, by doing so, Respondent violated Sections 8(a)(5) and (1) of the Act in that it failed to provide Local 135 with notice and the opportunity to bargain over the bonus. By way of defense, Respondent asserts that it did give the Union appropriate notice and remained amenable to bargaining over its bonus decision; it alternately claims that it was privileged, based on past practice, to award the bonuses absent notice to the Union. The General Counsel additionally alleges that Respondent violated Section 8(a)(3) and (1) of the Act by paying each of its nonrepresented employees a bonus twice the amount of the unit employees. Respondent asserts that its 2015 bonus payments merely acted to equalize the overall compensation paid to unrepresented versus represented employees and therefore cannot be found to have discriminated against the latter group.

### *A. Background*

Numerous witnesses offered evidence regarding the parties' past practice of awarding year-end bonuses. It is undisputed that, since at least 1999, Respondent had a policy of awarding such bonuses, that this practice was not negotiated with the Charging Party's predecessor, the CWA, and that unit employees' year-end bonuses have never been addressed in any collective-bargaining agreement. While the bonus amount varied from year-to-year based on the profitability of the casino operation,[8] there is no dispute that, prior to 2015, Respondent paid its union-represented employees and nonrepresented employees bonuses in equal amounts. (Tr. 113, 129, 168, 170, 229–231, 283-284, 355.)

The parties' current collective-bargaining agreement, effective March 11, 2015, to March 10, 2018, was reached after 6 days of bargaining between October 2014 and January of the following year. The Tribe's Attorney General, Tuari Bigknife (Bigknife), was Respondent's lead negotiator. Speaking for the Union was its president, Mickey Kasparian (Kasparian). It is undisputed that Respondent, during these negotiations, never made a specific proposal involving a year-end bonus. (R. Exh. 13; Tr. 256–258, 374.) However, the subject of bonuses was addressed—off the record—during two bargaining sessions in January. Respondent's general manager Christopher Kelley[9] testified that, at the first of the two meetings, Bigknife discussed three potential compensation "triggers": a flat, per-hour wage increase; a percentage wage increase; and a "bonus tool" that could either be used alone or in conjunction with one of the other options. Bigknife, according to Kelley, specifically asked if the Union had any interest in the third option, which would involve reserving a portion of the unit employees' compensation until the end of the year and then paying it in bonus form. Kasparian expressed no interest in that option and instead wanted to "stay strictly with a flat dollar amount per hour." (Tr. 201–202, 257.)

Ultimately, Kasparian proposed a 40-cent per hour, flat wage increase for unit employees, which Respondent accepted. In discussion of this increase, Bigknife specifically warned Kasparian that Respondent was agreeing to a greater wage increase for unit employees than it had budgeted for the Casino's nonbargaining unit employees.[10] Respondent, Bigknife said, was "going to have to find a way to make those guys whole" and that, if the casino operation hit

its profit targets during the year, Respondent would be paying out a bonus payment to the nonrepresented portion of its work force. (Tr. 263–264, 268.)[11] As both Bigknife and Kelley

[5] Respondent argues that *San Manuel* was implicitly overruled by the Supreme Court in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). The Board has since rejected this argument on the grounds that the *Bay Mills* holding was premised on precedent that the Board had already considered and distinguished in *San Manuel* itself. See *Casino Pauma*, supra at fn. 3.

[6] Because I find that Respondent's jurisdictional argument lacks merit, I do not need to decide whether, as the General Counsel and Charging Party have argued, Respondent was estopped from raising this argument based on its failure to raise it during the representation case proceeding that led to Local 135's certification.

[7] See Tr. 48–50.

[8] Witnesses generally agreed that: from 2008 to 2011, employees received $100 holiday gift cards; in 2012, employees received $1000 in cash; and in 2013 and 2014, employees received 100 "V-Bucks" (i.e., vouchers redeemable at certain casino operation establishments). (Tr. 130, 134–135, 283, 287, 289, 300.)

[9] While the witness testimony regarding the two meetings did not vary significantly, I have tended to credit Kelley, whose recollection was specific and unembellished. Kasparian did not testify.

[10] It is undisputed that Respondent did, during the year, award a 2-percent wage increase for its nonrepresented employees. (Tr. 367.)

[11] Bigknife's testimony was consistent; he claimed to having told Kasparian that Respondent "knew that there was going to need to be a

admitted, however, Respondent expressed no firm intention to paying a bonus; as Bigknife put it, "there was no decision at that time that we were going to pay bonuses." (Tr. 268–269, 449.)

### *B. The December 2015 Bonus*

According to Respondent's witnesses, 2015 was a more profitable year than they had foreseen in January. In early October, Respondent's vice president of human resources, Laura Brown (Brown), discussed with Kelley "how much money was available and who we were going to give bonuses to." (Tr. 324.) According to Kelley, because the Union had negotiated a raise that was significantly higher than that Respondent had paid to its nonrepresented work force, equity demanded that, for the first time, Respondent would pay the union-represented employees a lower bonus amount. Kelley explained that, in prior years, there had not been "this level of inequity" between the raises awarded each group. Kelley testified that, while she and Brown considered not awarding any bonus to the unit employees, they rejected this idea out of a concern that such an action would negatively impact morale. (Tr. 237, 324–325.)

According to Brown, Kelley dictated that the nonunion frontline (i.e., nonexempt) employees[12] should have a "significant" bonus, and this was the starting point she used to develop a methodology for the bonuses. (Tr. 326–327, 338.) Brown testified that, based on past bonuses, she interpreted "significant" to mean at least $1000 per employee; she then performed a rough calculation aimed at equalizing the two groups' overall annual compensation. As she explained it, based on the fact that unit employees had received an approximately 4-percent increase under their new contract and the nonunit employees had only received a 2-percent increase, she was able to achieve "parity" between the two groups by awarding each unit employee one half of the $1000 bonus offered to nonunit employees. (Tr. 335–336) According to Brown, the process of finalizing this calculation took approximately 2 months, during which time the Union was deliberately left out of the loop so that the bonus announcement would be "a surprise." (Tr. 333–334, 342.)

In early December,[13] Brown called Ramirez and invited him to attend a series of "all team member" meetings at the casino on December 8. Brown offered no information about the subject of the meetings, but told Ramirez the start time of each. Arriving at the casino approximately fifteen minutes before the start time for the first meeting, Ramirez encountered Bigknife; after Ramirez explained his presence, Bigknife expressed doubt that he had been invited to attend.[14] Ramirez proceeded to the casino's security office (where he typically checked in) and waited. After 5–8 minutes, Ramirez got a text message from Brown telling him to meet Bigknife at a different entrance, which he did. (Tr. 62–66.)

Once they had met up again, Bigknife told Ramirez that the meetings were being held to announce the employees' year-end bonus, and that the unit employees were going to receive one-half of the bonus amount received by the casino's nonrepresented employees. Bigknife then asked Ramirez if he still wanted to attend the meeting. According to Ramirez, Bigknife said, "there might be a lot of angry union members"; Bigknife recalled simply stating that Ramirez might not be "comfortable" attending. Ramirez responded in effect that he could handle any unhappy employees and would attend. (Tr. 67–68.)[15]

Following their discussion, Bigknife and Ramirez proceeded to the meeting together. Held in one of the casino's ballrooms, the meeting was attended by both represented and nonrepresented employees, as well as various levels of management, including Kelley and Brown. Brown informed the assembled employees that the nonrepresented employees were going to get a merit raise in January and that the union-represented employees would get their contractual raises shortly thereafter. (Tr. 70–71.) Next, Kelley spoke. After delivering a power point presentation lauding the casino's successful year, Kelley announced the year-end bonus, adding:

> Now there are three things about the bonuses that I would like you all to know. First, they will be distributed this Friday, December 11th within your departments unless you hear otherwise. Two, not all of the bonuses are for the same amounts. Three, to our union team members, this year's bonus is not something that is a part of the union contract. The compensation adjustments that you received were
> bargained for earlier this year and did not include bonuses. That being said, the Tribe has agreed to pay them anyway.
>
> But, given that our non-union team members' compensation was treated differently, our nonunion team members will see a bonus of at least double the union amount.

(R. Exh. 15.) It is undisputed that Kelley delivered the same remarks at each of the three employee meetings that day.

Immediately following the first meeting, Ramirez discussed the bonus announcement with Kelley, thanking him for giving the represented employees a bonus. According to Kelley, he also asked Ramirez how he thought the team members would react, to which Ramirez responded that there might be a "few complaints." Either the same day or the next, Ramirez also

---

true up at the end of the year and we were targeting bonuses for that true up." (Tr. 336.)

[12] While Brown initially testified that Kelley wanted "all the frontline team members" (i.e., including represented employees) to receive a significant bonus, she quickly corrected herself, noting that his reference was to all nonrepresented frontline employees. Based on Brown's candid demeanor, I believe that her initial characterization was an innocent misstatement. (Tr. 327.)

[13] The record is unclear as to when specifically this telephone conversation occurred. (Tr. 62, 329.)

[14] Bigknife did not deny making this remark and claimed that he knew that Ramirez was invited to the meeting. In any event, he admitted telling Ramirez to "hold on" because, although Bigknife planned on having "a conversation" with him, he needed to talk with Brown first and find out "what conversation she had had with him." (Tr. 356–357.)

[15] While Bigknife's version of the meeting contained more detail, including a specific reference to Respondent's concern with equalizing compensation between represented and nonrepresented employees, I do not find any material distinctions in his recollection versus that of Ramirez. (Tr. 357–358.)

thanked Brown. According to Brown, Ramirez mentioned the bonus discrepancy between unit and nonunit members and "just kind of shrugged and said that's my job to deal with that." At some point on December 8, Ramirez informed Kasparian about the bonus announcement. (Tr. 95–96, 108–110, 228, 330.)

## DISCUSSION AND ANALYSIS[16]

### *A. Did the 2015 Year-End Bonus Violate Section 8(a)(3)?*

Section 8(a)(3) of the Act makes it unlawful for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." As the Supreme Court has explained, the Act's reference to "discrimination" and "to . . . discourage" signify that, to violate this Section 8(a)(3), an employer must be motivated by an antiunion purpose. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Accordingly, to establish a violation, the General Counsel is typically expected to prove such a motive. Id.

In this case, I find that the General Counsel did not adduce any extrinsic evidence of animus against the Union, which is fatal to its prima facie case under a traditional, *Wright Line*[17] analysis. In particular, I reject the General Counsel's contention that Respondent's motive is suspect because it acted inconsistently with its stated "benchmark" of paying *all* frontline employees a "significant" bonus. This argument appears to be premised on the minor (and quickly corrected) misstatement by Brown in explaining the process of formulating the bonuses (discussed supra), and not otherwise borne out by the record evidence. The General Counsel also suggests that Kelley's comments in announcing the bonuses were intended to convey to unit employees that they were considered less valuable to Respondent based on their represented status. I disagree. On its face, what Kelley's speech conveyed was that the lower bonus for unit employees was due to the wage increase it had agreed to pay them earlier that year.[18]

The lack of extrinsic evidence of an antiunion motive, however, is not determinative here, in that I find that this case is more properly analyzed under the Supreme Court's *Great Dane* standard. Under this doctrine, the Board recognizes that some employer conduct is so "inherently destructive" of employee interests that it may be deemed proscribed by Section 8(a)(3) even absent proof of an underlying improper motive. *Great Dane Trailers*, supra at 33; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963). In such cases, the conduct "bears its own indicia of intent" and an employer violates the Act "whatever the claimed overriding justification may be," because it is presumed "[t]o intend the very consequences which foreseeably and inescapably flow from [its] actions . . ." *Great Dane Trailers*, supra at 33; *Erie Resistor Corp.*, supra at 228.[19] That said, not every action that facially discriminates on the basis of Section 7 activity is properly considered inherently destructive; as the Supreme Court has cautioned, where an employer's conduct results in only a "comparatively slight" harm to employee rights, the employer's action will not itself definitively establish animus and it may defend itself by showing its conduct served "a substantial and legitimate business end." *Erie Resister Corp.*, 373 U.S. at 228.

In *International Paper Co.*, the Board set forth four "fundamental guiding principles" for determining whether employer conduct is properly considered inherently destructive or should instead be viewed as having only a "comparatively slight" impact on employee rights. 319 NLRB 1253, 1269 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997). First, the Board looks to the severity of the harm to employees' Section 7 rights. Second, the Board considers the temporal impact of the employer's conduct, i.e., whether the conduct merely influences the outcome of a particular dispute or whether it has "far reaching effects which would hinder future bargaining." Third, the Board distinguishes between conduct intended to support an employer's bargaining position as opposed to conduct demonstrating "hostility to the process of collective bargaining." Finally, the Board assesses whether the employer's conduct discourages collective bargaining by "making it seem a futile exercise in the eyes of the employees." Id. at 1269–1270. In accordance with these principles, the Board has found that "[w]here an employer withholds from its represented employees an existing benefit (i.e., an established condition of employment), such conduct is inherently destructive."[20]

As discussed, infra, I find such cases distinguishable and further find that Respondent's actions were not inherently destructive. It is true that Respondent facially withheld at least a portion of an established benefit (an equal bonus) from its represented work force. To the extent Respondent appeared to condition the right to a "significant" bonus on employees' nonrepresented status, it could be viewed as punishing Unit employees while rewarding its remaining employees for not choosing union representation. Had the Unit employees not received, as a result of contract negotiations, double the wage increase of their nonrepresented counterparts, the chilling effect of Respondent's singling them out for lower bonus payments would in fact be severe and arguably far reaching. However, viewed against the backdrop of the Unit employees' relatively generous

[16] To the extent that I have made them, my credibility findings are indicated above in the findings of fact for this decision. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 13–14 (2014).

[17] See 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[18] I note that the General Counsel does not allege that Kelley's comments amounted to an individual violation of Section 8(a)(1). See, e.g., *Phelps Dodge Min. Co.*, 308 NLRB 985, 995 (1992) (statement about a benefit that suggests that coverage is conditioned on nonrepresented status independently violates § 8(a)(1)), enf. denied 22 F.3d 1493 (1994).

[19] Under such circumstances, the employer's only defense is to "explain[] away, justify[] or characterize[e]" its actions "'as something different than they appear on their face.'" *Great Dane Trailers, Inc.*, 388 U.S. at 33–34.

[20] *Arc Bridges, Inc.*, 355 NLRB 1222, 1223 (2010) (withholding annual, across-the-board wage increase from represented employees is inherently destructive), enf. denied 662 F.3d 1235 (D.C. Cir. 2011); *Eastern Maine Medical Center*, 253 NLRB 224, 242 (1980) (same), enfd. 658 F.2d 1 (1st Cir. 1981).

2015 raise, I do not interpret Respondent's act of offsetting a wage differential with year-end bonuses as having such an effect, and the General Counsel offered no compelling evidence to the contrary.

For the same reason, I do not find that the 2015 bonuses evidenced hostility to collective bargaining or made bargaining appear futile. Where the withdrawal of a benefit based on union membership has been found inherently destructive, the Board has specifically noted that the withdrawal was either (a) undertaken taken in direct response to its employees' selection of a collective-bargaining representative;[21] or (b) put in effect *during* the course of negotiating wages with the employees' union.[22] In both cases, the employer's aim in withholding a benefit is to force the union to bargain for it back; therefore, collective bargaining is frustrated and the withholding is deemed inherently destructive. The same cannot be said where, as here, the impetus for the withholding was not to gain an edge in ongoing or future bargaining but rather to accommodate the Union's demand for an up-front wage increase twice what Respondent paid its nonrepresented work force. In this regard, I credit Respondent's witnesses, who consistently testified that the reason for paying lower bonus amounts to represented employees was to equalize the two employee groups' overall pay. At the bargaining table, Bigknife foreshadowed this, by announcing, in the context of the unit employees' wage increase, that Respondent was going to have to make its non-represented employees "whole" by means of a bonus payment. Under these circumstances, I cannot find that Respondent's conduct had the inevitable effect of discouraging collective bargaining in the affected employees' eyes to the point of making it appear futile.[23] Instead, I find that any harm to unit employees' rights caused by the bonus differential was "comparatively slight," and that Respondent established a substantial and legitimate business justification for awarding them a lower bonus.

Accordingly, consistent with the above-cited precedent, I find no merit to the allegation that Respondent violated Section 8(a)(3) and (1) of the Act, and would dismiss that portion of the complaint.

*B. Did the 2015 Year-End Bonus Violate Section 8(a)(5)?*

It is well established that, as a general rule, an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). A unilateral change to a mandatory subject is a per se breach of the Section 8(a)(5) duty to bargain, and no showing of a bad-faith motive is required. Id. at 743. The fact that a unilateral change is economically beneficial to employees does not excuse the violation. *Allied Mechanical Services*, 332 NLRB 1600, 1609 (2001) (whether beneficial or harmful to employees, the unilateral changes offend the employer's statutory bargaining obligation). It is well established that the payment of an employee bonus is a mandatory subject of bargaining, even where, as here, the bonus is an implied term and condition of employment established by the parties' past practice, rather than the subject of a contractual provision. *Santa Cruz Skilled Nursing Center, Inc.*, 354 NLRB No. 25, slip op. at 4 (2009) (not reported in Board volumes); *Finch, Pruyn & Co.*, 349 NLRB 270 fn. 31 (2007) (citation omitted); *Bonnell/Tredegar Industries*, 313 NLRB 789 (1994), enfd. 46 F.3d 339 (1995). See also *Lafayette Grinding Corp.*, 337 NLRB 832 (2002) (making unilateral change to implied term or condition of employment violates the Act).

Respondent has the burden to show that the Union received timely and meaningful notice—actual or constructive—of the 2015 bonus payment.[24] Where an employer merely informs a union of a course of action that the employer *will* take, without inviting the Union to discuss the matter, this does not constitute meaningful notice and an opportunity to bargain. *General Die Casters, Inc.*, 359 NLRB 89, 105 (2012); *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994); *Ciba-Ceigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). Moreover, once an employer announces a unilateral change to the affected employees, the Union can reasonably conclude at that point that the matter is a fait accompli and that it would therefore be futile to object. See, e.g., *Burrows Paper Corp.,* 332 NLRB 82, 83 (2000) (following employer's announcement of a wage increase to employees, Union could reasonably conclude that Respondent had made up its mind and objecting to the raises would be futile) (citing *Insulating Fabricators, Inc. Southern Division*, 144 NLRB 1325, 1332 (1963); *Intersystems Design Corp.*, 278 NLRB 759 (1986)).

In this case, despite the fact that it had determined months earlier to pay its union-represented employees a year-end bonus, Respondent deliberately kept its plan under wraps and only informed Local 135's representative Ramirez about it minutes before it was to be announced to the affected employees. Moreover, contrary to Respondent's claims, Respondent never indicated that it was open to discuss *whether* to award the year-end bonus; instead, Bigknife by his own admission simply informed Ramirez that the bonus would be paid. By presenting its decision as a fait accompli, Respondent relieved the Union of its duty to request bargaining. In addition, unlike the cases cited by Respondent, the "pre-implementation notice" given to Local 135 was followed a mere 10 minutes later by the announcement of that change to the affected employees. Thus, even to the extent that Bigknife's remarks could be interpreted as an invitation to bargain, allowing the Union the time in which it took Ramirez and Bigknife to walk to the meeting to effectively protest the bonus utterly fails to meet the standard of

[21] See, e.g., *United Aircraft Corp, Hamilton Standard Division (Bran Filament Plant)*, 490 F.2d 1105 (2d Cir. 1973), enfg. 199 NLRB 658 (1972).

[22] See, e.g., *Arc Bridges, Inc.*, and *Eastern Maine Medical Center*, supra.

[23] Once again, I note that the General Counsel has not alleged that Kelley's comments constituted an independent violation of Section 8(a)(1).

[24] *Catalina Pacific Concrete Co.*, 330 NLRB 144 (1999); *Metropolitan Teletronics*, 279 NLRB 957 (1986), enfd. 819 F.2d 1130 (1987); see also *Defiance Hospital*, 330 NLRB 492 (2000) ("[a]n employer must inform a union of its proposals under circumstances which at least afford a reasonable opportunity for counter arguments or proposals") (citing *NLRB v. Centra, Inc.*, 954 F.2d 366 (6th Cir. 1992)).

timely and meaningful notice.[25]

Respondent alternately claims that, because the 2015 bonus structure acted to equalize the overall compensation awarded to its union-represented versus nonrepresented work force, Respondent's decision to implement this measure "merely maintained the status quo" of implementing bonuses "with the goal of equalizing annual compensation" among the two groups. (R. Br. at 35–36 & fn. 16) But the record indicates that Respondent had no past practice of using bonuses in this manner; indeed Kelley's admission that there had been at least some overall inequity between the two groups in the past, the pre-2015 bonuses had always been equal. (See Tr. 237; "[s]o we hadn't had *this level* of inequity in prior years. . . [n]ow for the first time we had a *very significant level* of disequilibrium between the two halves of the workforce") (emphasis added). As such, Respondent's alternate defense of maintaining the status quo is rejected.

While Respondent does not explicitly argue that Local 135 waived the right to bargain over a reduced bonus amount, any such claim would lack merit, in that there is no credible evidence to support such a claim. The party claiming that a waiver has occurred bears the burden of showing that the union clearly and unmistakably relinquished its right to bargain over the subject matter. *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005); *TCI of New York*, 301 NLRB 822, 824 (1991); *Twin City Garage Door Co.*, 297 NLRB 119, 128 (1989). Here, the evidence establishes that prior to the day of the bonus announcement, Respondent did not provide clear notice of its intent to change the past practice by halving the amount of bonuses paid to unit employees. *Sykel Enterprises, Inc.*, 324 NLRB 1123, 1123 (1997) (in absence of a clear notice of an intended change to a past practice, there is no basis to find that a union waived its right to bargain over the change).

Consistent with the above-cited precedent, Respondent, by implementing its December 2015 year-end bonus for unit employees without advance notice to the Union and without providing an opportunity to bargain, made an unlawful unilateral change. Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged.

## CONCLUSIONS OF LAW

1. Respondent Viejas Band of Kumeyaay Indians is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers International Union Local 135, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act with 9(a) status under the Act.

3. At all times since September 30, 2014, the Union has been the certified collective-bargaining representative, within the meaning of Section 9(b) of the Act, of an appropriate unit of employees, comprised of:

> Individuals employed within the following classifications: Asian Cook, Asian Host/Cashier, Barback, Barista, Bartender I, Bartender II, Bartender III, Bingo Snack Bar Attendant, Busser, Busser-Buffet, Busser-Restaurant, Casino Porter, Casino Service Attendant, Cook I, Cook I-Pastry, Cook II, Cook II-Fine Dining, Cook II-Pastry, Cook III, Cook III-Fine Dining, Expediter, F&B Attendant, Host-Fine Dining, Host/Cashier II, Host/Cashier Non-Tipped, Host/Cashiers Tipped, Kitchen Utility I, Kitchen Utility/Heavy Cleaner, Maint Utly Wrkr, Server Bingo, Server Buffet, Server Entertainment, Server Fine Dining, Server Restaurant, Server Table Games Cardrm, and Spec Functions Personnel.

4. At all material times, Respondent has recognized the Union as the designated exclusive collective-bargaining representative of the unit employees.

5. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally revising its year-end bonus program by reducing the bonus amount paid to unit employees without providing the Union with prior notice and the opportunity to bargain over this decision or its effects.

6. The unfair labor practices, described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In addition to the usual cease-and-desist order and other affirmative relief, I recommend that the Respondent be ordered to make the unit employees whole for the loss of earnings they suffered as a result of the Respondent's unlawful, unilateral, and discriminatory change to its established practice regarding annual supplemental bonuses. The backpay is to be augmented by interest computed in accordance with *New Horizons*, 283 NLRB 1173 (1987).[26]

Additionally, in accordance with the Board's decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent should be ordered, within 21 days of the dates the amounts of backpay are fixed, either by agreement or Board order, to submit and file the appropriate documentation allocating the backpay awards to the appropriate calendar quarters or periods (reports allocating backpay) with the Regional Director for Region 21. Respondent will be required to

[25] I reject Respondent's argument that Kelley, at the employee meetings, left open the possibility for bargaining by stating that the bonuses would be distributed the following Friday "within your departments unless you hear otherwise." At most, this suggests to me that Respondent was leaving its options open as to the timing and means of distributing the bonus payments; that Kelley was somehow telegraphing in these remarks a willingness to bargain over *whether* to award the bonuses is frankly implausible on its face.

[26] In cases involving a violation of Section 8(a)(5) based on an employer's unilateral alteration of existing benefits, it is the Board's established policy to order restoration of the status quo ante to the extent feasible, and in the absence of evidence showing that to do so would impose an undue or unfair burden upon the respondent. *Allied Products Corp., Richard Brothers Division*, 218 NLRB 1246, 1246 (1975), enfd. in part, 548 F.2d 644 (6th Cir. 1977). Respondent claims that a make-whole remedy is an impermissible "windfall" to Unit employees. I disagree; Respondent acted at its peril by agreeing to the Unit employees' wage increase without demanding a corresponding decrease in their established bonus amounts. As such, I do not consider a make-whole remedy undue or unfair.

allocate backpay to the appropriate calendar years only. The Regional Director then will assume responsibility for transmission of the reports to the Social Security Administration at appropriate times and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

Respondent, Viejas Band of Kumeyaay Indians, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the exclusive bargaining representative of employees in the following unit (the unit):

> Individuals employed within the following classifications: Asian Cook, Asian Host/Cashier, Barback, Barista, Bartender I, Bartender II, Bartender III, Bingo Snack Bar Attendant, Busser, Busser-Buffet, Busser-Restaurant, Casino Porter, Casino Service Attendant, Cook I, Cook I-Pastry, Cook II, Cook II-Fine Dining, Cook II-Pastry, Cook III, Cook III-Fine Dining, Expediter, F&B Attendant, Host-Fine Dining,
> Host/Cashier II, Host/Cashier Non-Tipped, Host/Cashiers Tipped, Kitchen Utility I, Kitchen Utility/Heavy Cleaner, Maint Utly Wrkr, Server Bingo, Server Buffet, Server Entertainment, Server Fine Dining, Server Restaurant, Server Table Games Cardrm, and Spec Functions Personnel.

(b) Unilaterally reducing the annual, year-end bonus for unit employees, without first affording the Union notice and an opportunity to bargain over this decision and/or its effects.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind the unlawful unilateral change implemented in December 2015 to the annual, year-end bonus for unit employees, and notify its employees in writing that this has been done.

(b) Before implementing any changes in wages, hours or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as their exclusive collective-bargaining representative of the unit employees.

(c) Make employees who were part of the unit and eligible for an annual, year-end bonus in 2015 whole, with interest, for the loss in earnings they suffered as a result of the unlawful change to the practice of awarding annual, year-end bonuses, and specifically for the reduction in the amounts of their bonuses in 2015.

(d) Within 14 days after service by the Region, post, in English and Spanish, at its Alpine, California job location copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 8, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, D.C. October 11, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

> Form, join, or assist a union
> Choose representatives to bargain with us on your behalf
> Act together with other employees for your benefit and protection
> Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

The United Food and Commercial Workers Union Local 135, AFL–CIO, CLC (the Union), is the representative of the employees in the following unit for purposes of dealing with us regarding wages, hours and other working conditions:

> Individuals employed within the following classifications: Asian Cook, Asian Host/Cashier, Barback, Barista, Bartender I, Bartender II, Bartender III, Bingo Snack Bar Attendant, Busser, Busser-Buffet, Busser-Restaurant, Casino Porter, Casino Service Attendant, Cook I, Cook I-Pastry, Cook II, Cook II-Fine Dining, Cook II-Pastry, Cook III, Cook III-Fine Dining, Expediter, F&B Attendant, Host-Fine Dining,
> Host/Cashier II, Host/Cashier Non-Tipped, Host/Cashiers

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Tipped, Kitchen Utility I, Kitchen Utility/Heavy Cleaner, Maint Utly Wrkr, Server Bingo, Server Buffet, Server Entertainment, Server Fine Dining, Server Restaurant, Server Table Games Cardrm, and Spec Functions Personnel.

WE WILL NOT refuse to recognize and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of our employees in the above-mentioned unit.

WE WILL NOT unilaterally reduce your annual, year-end bonus without first providing the Union notice and an opportunity to bargain over this decision and/or its effects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful unilateral change implemented in December 2015 to our annual, year-end bonus practice, and notify you in writing that this has been done.

WE WILL, before implementing any changes in your wages, hours or other terms and conditions of employment, notify and, on request, bargain with the Union as your exclusive collective-bargaining representative.

WE WILL make employees who were part of the unit and eligible for a year-end, annual bonus in December 2015 whole, with interest, for the loss in earnings they suffered as a result of the unlawful change to our practice regarding annual, year-end bonuses and for the reduction in the amounts of their 2015 bonuses.

VIEJAS BAND OF KUMEYAAY INDIANS D/B/A VIEJAS CASINO & RESORT

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-166290 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.